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No. 06-340

FILED
SEP 26 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE OF ARIZONA'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Introduction

The State of Arizona, which intervened in this case in the Court of Appeals for the Ninth Circuit, requests that this Court grant the Petition for Writ of Certiorari (Petition) filed by the National Association of Home Builders and others (Home Builders) on September 6, 2006. *See* Supreme Court Rule 12.6 (allowing a respondent who supports the petitioner's position to file a supporting response within twenty days of the petition). A majority of a panel of the court of appeals erroneously invalidated the Environmental Protection Agency's (EPA's) transfer of the Clean Water Act pollution permitting program to Arizona.[1] In reaching its decision, the court of appeals incorrectly found that the requirements of the Endangered Species Act (ESA)[2] could be imposed on EPA's transfer decision despite mandatory provisions of the Clean Water Act. The decision thus directly conflicts with the decisions of the courts of appeals for the Fifth and D.C. Circuits, is contrary to Congress's intent to preserve the States' right to regulate water pollution and land and water use planning, and wrongfully expands the Endangered Species Act to reach all federal agency actions, regardless of the mandatory provisions of other federal statutes. This Court should grant the Petition for Writ of Certiorari to provide uniformity and certainty in this critical area of environmental law that directly affects the federal government's relationship with the States.

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[1] Congress created this program (the national pollutant discharge elimination system) and authorized EPA to transfer the program to the States in Section 402 of the Clean Water Act. 33 U.S.C. § 1342.

[2] 16 U.S.C. §§ 1531 to 1544.

B. Arizona's National Pollutant Discharge Elimination System (AZPDES)

In January, 2002, Arizona applied to EPA for transfer of the national pollutant discharge elimination system (NPDES) program regarding Arizona waterways (except those on Indian land). (Pet. App. 7.)[3] On December 5, 2002, the EPA approved the State of Arizona's application to administer the NPDES program pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). (Pet. at 5.) Arizona thus became the forty-fifth State to obtain this authority. (Pet. App. 4.) The EPA found that Arizona had met all the requirements of Section 402(b). This finding is not disputed by any party. (Pet. App. 31 n.11.)

Arizona obtained the EPA's approval of the Arizona program, known as the Arizona Pollutant Discharge Elimination System program (AZPDES), as the result of more than two years of effort. (Arizona App. 6.) The State invested over one million dollars in resources and staff time in creating the AZPDES program. (*Id.*) Arizona state employees developed new state laws and rules, prepared the submission of the Arizona program for approval, negotiated and drafted the memoranda of agreement with EPA to implement the program, and drafted the program guidance materials for the regulated community. *Id.* Arizona's financial commitment to AZPDES has increased substantially during the pendency of this appeal.[4]

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[3] Arizona adopts the Petition's Statement of the Case and thus focuses here only on the facts that demonstrate how the court of appeals decision will affect Arizona.

[4] The Ninth Circuit stayed its mandate for ninety days pending the filing of a petition for certiorari and continued the stay if the writ of

(Continued on following page)

Invalidation of the AZPDES program would seriously disrupt the pollution permitting process in Arizona. If Arizona's authority to continue its program is vacated, regulated facilities would not know where to send information regarding their permits, how to send it, or what government official to contact regarding permit issues. (Arizona App. 7.) Action on permit applications would be substantially delayed pending a determination as to which agency would take over their processing. (*Id.* at 8.)

Further, invalidation of the AZPDES program would halt or delay Arizona business activities, including construction projects, that are proceeding under general permits that have been issued in the AZPDES program. For example, in 2003 the Arizona Department of Environmental Quality (ADEQ) completed promulgation of the AZPDES Construction General Permit. (*Id.*) As the Ninth Circuit majority noted, ADEQ issues several thousand stormwater discharge construction permits annually. (Pet. App. 49 n.22.) The EPA revised its National Construction General Permit on July 1, 2003, but it does not cover construction projects in Arizona outside of reservations. 68 Fed. Reg. 39087, 39089 (July 1, 2003). If Arizona's Construction General Permit is invalid, there will be many new construction sites that would otherwise be covered by the Arizona permit that will no longer be able to legally discharge under any authority. (Arizona App. 8.)

Finally, invalidation of the AZPDES program will negatively affect Arizona's environment and water quality.

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certiorari is granted. *Defenders of Wildlife v. United States EPA*, No. 03-71439 (9th Cir. June 16, 2006) (Arizona App. 10-11.) Because Home Builders filed a timely Petition, the mandate is stayed pending this Court's decision on the Petition.

(*Id.*) ADEQ has implemented education and outreach efforts to ensure that the regulated community understands its responsibilities under the Clean Water Act and Arizona law. (*Id.*) Under the AZPDES program, there are more inspections of, and other site visits to, discharging facilities than there were when EPA was managing the NPDES program in Arizona. (*Id.*) These benefits and increased regulatory oversight would cease if the AZPDES program's authority is invalidated. (*Id.*)

In addition, since approval of AZPDES, ADEQ has provided the United States Fish and Wildlife Service ("Service") with significantly increased notice of proposed projects in Arizona that may affect endangered species. (Arizona App. 2-3.) ADEQ requires every construction general permit applicant to submit a Notice of Intent including a unique geographic identifier. (*Id.* at 3.) The Service has provided ADEQ a geographic information system map that identifies the areas in Arizona that are of critical habitat concern. (*Id.*). ADEQ's "Smart Notice of Intent" computer system matches the identified project area with the established areas of concern provided by the Service. (*Id.*) Upon receiving a general permit Notice of Intent in an area of critical habitat concern, ADEQ informs developers that they are not authorized to discharge for thirty-two business days – thus, preventing the beginning of construction during that time. (*Id.*) ADEQ sends a copy of Notices of Intent that affect critical habitat areas to the Service. (*Id.* at 4.) The Service thus has thirty-two days to assess the impact on endangered species and contact the developer concerning the impacts. (*Id.*) Under the federal NPDES program in Arizona, developers could

automatically begin construction within forty-eight hours of giving notice. (*Id.* at 3.)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decision Creates a Direct Conflict Among the Circuits Concerning Whether the Requirements of Section 7 of the Endangered Species Act May Be Imposed on a Federal Agency Decision that Is Mandated Under Another Federal Statute.

Even though all parties acknowledge that Arizona's transfer application met all the criteria under Section 402 (b) of the Clean Water Act, the Ninth Circuit vacated EPA's approval of AZPDES because EPA did not comply with Section 7(a)(2) of the Endangered Species Act. (Pet. App. 31 n.11, 63.) The majority's determination directly conflicts with the Fifth Circuit decision in *American Forest and Paper Association v. United States E.P.A.*, 137 F.3d 291 (5th Cir. 1998), and the D.C. Circuit decision in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27 (D.C. Cir. 1992). (*See* Petition at 11-18.)

In *American Forest*, the Fifth Circuit held that Section 7 of the Endangered Species Act does not provide authority for the EPA to add requirements to the approval of a state NPDES permitting program pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). 137 F.3d at 297. *American Forest* therefore addresses the precise issue presented by the Petition. Although *Platte River* did not involve EPA's authority to withhold its approval of a state permitting program under the Section

402(b) of the Clean Water Act, the D.C. Circuit did hold that Section 7 of the Endangered Species Act "does not expand the powers conferred on an agency by its enabling act." 962 F.2d at 34. Thus, *Platte River* conflicts with the Ninth Circuit's determination that the Endangered Species Act gives EPA the authority to deny approval of the AZPDES program even though Arizona has met all the criteria set forth for such approval in the Clean Water Act.

Although the Ninth Circuit panel majority acknowledges that there is an intercircuit conflict concerning whether Section 7(a)(2) of the Endangered Species Act provides additional authorities to agencies, it opines that its decision is consistent with preexisting precedent from other circuits. (Pet. App. 44-45 [relying on *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979)].) As Judge Kosinski noted in his dissent from the denial of rehearing en banc, the Eighth and First Circuit decisions are inapposite because they "address situations where the governing statute and the ESA were complementary, not where the governing statute *precluded* consideration of endangered species as the CWA does." (Pet. App. 148 n.5.) Arizona agrees with Home Builders that the Ninth Circuit decision here created an intercircuit conflict. (Petition at 18-20.)

This Court should grant the writ of certiorari to resolve the conflict between the Ninth Circuit and the Fifth and D.C. Circuits. Arizona and other States governed by the Ninth Circuit decision should not be required to comply with an erroneous application of the Endangered Species Act when the States in other circuits have received

or will receive approval of their permitting programs upon compliance with Section 402(b) of the Clean Water Act.[5]

II. The Ninth Circuit's Decision Is Contrary to the Purpose and Language of the Clean Water Act and the Endangered Species Act.

The Clean Water Act manifests Congress's desire that the respective States be responsible for running the Act's several pollution control programs, including the NPDES program at issue in this case:

> It is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. *It is the policy of Congress that the States manage* the construction grant program under this chapter *and implement the permit programs under Sections 1342 and 1344* of this title.

33 U.S.C. § 1251(b) (Pet. App. 160) (emphasis added).

Further, under the Clean Water Act NPDES statutes, at Section 402(b), 33 U.S.C. § 1342(b), the EPA administrator "shall approve" each State application to administer the NPDES program "unless" he determines that the applying State does not meet one of the nine specified

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[5] The State of Alaska has recently applied to EPA for approval of its NPDES permit program. (*See* State of Alaska's Amicus Brief in support of the Petitions for Rehearing at 1.) Alaska is concerned about the impact of the Ninth Circuit decision on its ability to obtain EPA approval. (*Id.* at 2.)

requirements set forth therein. (Pet. App. 165-167.) This Court and others have recognized that approval is thus mandatory where a State, like Arizona, demonstrates that it has met all nine criteria. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 208 (1976); *American Forest*, 137 F.3d at 297; *Natural Resources Defense Council v. United States EPA*, 859 F.2d 156, 174 (D.C. Cir. 1988); *Citizens for a Better Env't v. EPA*, 596 F.2d 720, 722 (7th Cir. 1979).

The Ninth Circuit majority opinion ignored both the clear statement of congressional intent in the Clean Water Act and its plain language in holding that Section 7 of the Endangered Species Act expanded the requirements that Arizona must meet to receive EPA approval of its NPDES program. This Court should therefore grant the writ of certiorari to correct this erroneous interpretation of the Clean Water Act.

In addition to conflicting with the Clean Water Act, the Ninth Circuit majority opinion conflicts with Congress's decision not to impose the requirements of the Endangered Species Act on the States. (Pet. App. 6.) The majority opinion found that the transfer of the NPDES program to Arizona would harm endangered species because Section 7 consultation would not be required when Arizona was running the program. (Pet. App. 6, 47.) Arizona took a number of actions to increase its protection of endangered species, including its innovative "Smart Notice of Intent" program that provides early warning to the State and the Fish and Wildlife Service whenever a development is proposed near critical habitat. Nonetheless, the Ninth Circuit majority opinion makes it clear that Arizona's voluntary efforts did not suffice under Section 7 to allow the program transfer to proceed:

> In the abstract, voluntary compliance by state agencies willing to follow [Fish and Wildlife Service] recommendations to the same extent as would the EPA *might* substitute for section 7 coverage. The EPA, however, could not so conclude without first analyzing the likelihood that *all* relevant Arizona agencies can and would live up to the Game and Fish Department's promises, as well as considering the effectiveness of federal oversight if Arizona agencies fail to live up to any such promises.

(Pet. App. 60.)

Under the majority's analysis, arguably the States that do not have authority over their NPDES programs could not receive EPA approval without first statutorily creating programs substantially similar to the Endangered Species Act, or by agreeing to consult with the Fish and Wildlife Service or National Marine Fisheries Service on all state NPDES permitting decisions. The Ninth Circuit majority opinion does not describe how a State could obtain approval of its NPDES program without committing itself, by law or agreement with the EPA, to following Section 7 requirements.[6] Because the majority opinion has the effect of imposing Endangered Species Act requirements on Arizona and other States in the Ninth Circuit, it is contrary to Congress's determination that the States are not subject to Endangered Species Act requirements.

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[6] Alaska shares Arizona's concerns about the practical difficulty of evaluating whether the EPA approval of its NPDES program will affect endangered species. (*See* Amicus Brief of State of Alaska in Support of Petitions for Rehearing at 4.)

The Ninth Circuit majority also misreads the legislative history of the Endangered Species Act. It contends that the *American Forest* and *Platte River* courts failed to make the distinction between the requirements of Sections 7(a)(1) and 7(a)(2) of the ESA, with the latter supposedly providing an additional unqualified mandate controlling the actions of federal agencies. (Petition App. 33-38, 46-47.) Yet, as pointed out by Home Builders (Petition at 16-17), the two subsections originated as a single provision, and both were qualified by the phrase "utilize their authorities," thus limiting an agency's ESA responsibility to actions within its statutory powers. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (Pet. App. 483). When Congress separated Section 7 into subsections in 1978, it explained that the revision merely restated "existing law." H.R. Conf. Rep. No. 95-1804 at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486 (Pet. App. 487). The Ninth Circuit's dramatic expansion of federal agency authority and responsibility under the Endangered Species Act is thus not supported by the Act's legislative history.

The Ninth Circuit majority opinion is wrong because it is contrary to the Clean Water and Endangered Species Acts. Arizona has invested considerable resources in developing and operating the AZPDES program. And, according to Congress, Arizona has the right to control that program. Further, the majority opinion may well affect the States and federal agencies in matters other than approval of state NPDES programs. As stated by Judge Kozinski in his dissent from the denial of rehearing en banc: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to

every federal agency." (Pet. App. 145 n.4.) In light of Arizona's interests and those of the other States in the Ninth Circuit, this Court should grant the writ of certiorari to ensure consistency and certainty in the application of federal environmental laws.

CONCLUSION

The Court should grant the petition for writ of certiorari.

DATED: September 26, 2006.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

v.

LT. GENERAL ROBERT B. FLOWERS, *et al.*,

Defendants,

and

STATE OF ARIZONA, *ex rel.* STEPHEN A. OWENS, DIRECTOR, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, *et al.*,

Intervenors-Defendants.

NO. CV02-0195-TUC-CKJ

AFFIDAVIT OF KAREN L. SMITH

STATE OF ARIZONA)
) ss.
County of Maricopa)

KAREN L. SMITH, being first duly sworn, deposes and says:

1. I am the Director of the Water Quality Division of the State of Arizona Department of Environmental Quality ("ADEQ"), and have been duly authorized by the Director of ADEQ, Stephen A. Owens, to give this Affidavit on his behalf and on behalf of the Department. This affidavit is made upon my own personal knowledge and upon information and belief.

2. As Director of the Water Quality Division, I have worked on and supervised the effort by the State of Arizona to obtain delegation from the United States Environmental Protection Agency ("EPA") of the authority to conduct permitting of discharging facilities under the National Pollutant Discharge Elimination System ("NPDES") program under the federal Clean Water Act, Section 402(b), 33 U.S.C. § 1342(b).

3. I have read the allegations of Plaintiffs in this action regarding the supposed harm to endangered species due to the "loss" of required consultation with the U.S. Fish and Wildlife Service (the "Service") on projects permitted under the Arizona replacement to the NPDES program, known as the Arizona Pollutant Discharge Elimination System or "AZPDES".

4. Under the new AZPDES program, the State of Arizona ADEQ has coordinated with the Service to provide the Service with significantly increased notice of proposed projects in the State which may impact endangered

species, so that the Service has a greater, not lesser, chance to consult regarding the development in order to protect endangered species.

5. As part of ADEQ's new "Smart Notice of Intent" computer application under AZPDES, ADEQ can defer an authorization to discharge under a General Permit for 32 *business* days, for projects located in areas the Service has told ADEQ are of critical concern as habitat for endangered species. The Service has provided to ADEQ a geographic information system "map" which identifies those areas of the State of Arizona which are of critical habitat concern.

6. ADEQ requires every permit applicant to submit a Notice of Intent including a unique geographic identifier, such as a latitude/longitude location, and our new computer system automatically matches the identified project area with the established areas of concern provided by the Service. This process is followed even for projects in areas not involving water quality issues or impacts, but which could possibly impact upland terrestrial species, including the pygmy owl.

7. Upon receiving a general permit Notice of Intent in an area of critical habitat concern, ADEQ informs developers that they are not authorized to discharge for 32 business days, thus preventing the commencement of construction during that time. Under the Federal NPDES program in Arizona, which AZPDES replaced, construction was automatically authorized to begin within 48 hours of mailing of the Notice of Intent, and under this older system it could be weeks or even months before the Service or EPA might be aware that a project was being constructed in an area of critical habitat concern.

8. Upon ADEQ's receipt of a Notice of Intent, ADEQ sends, via electronic mail or facsimile, a copy of the Notice of Intent to the Service so that the Service can immediately begin assessment of the impact of the proposed project. As stated, the Service has 32 days under the AZPDES program to contact the developer and initiate consultation about the project's endangered species impacts.

9. Also, upon receipt of a Notice of Intent, ADEQ sends to the applicant a letter from the Service stating the penalties associated with violation of Section 9 of the Endangered Species Act, and requesting a meeting between the Service and the developer.

10. ADEQ has also committed to assisting local communities with development of Habitat Conservation Plans under the Endangered Species Act, where it would be useful for the Department to become involved. I have been informed that the Fish and Wildlife Service considers these plans to be crucial to the successful management of endangered species issues in Arizona. These plans are in the process of being developed for Pima County and the City of Marana in Pima County.

/s/ Karen L. Smith
Karen L. Smith

SUBSCRIBED AND SWORN to before me this 18th day of April, 2003.

My Commission Expires:

4/19/2004

/s/ Richard David Slaugenhoupt
Notary Public

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE; AND CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

STATE OF ARIZONA *ex rel.*, STEPHEN A. OWENS, DIRECTOR, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Applicant in Intervention.

Case No. 03-71439

AFFIDAVIT OF KAREN L. SMITH

STATE OF ARIZONA)
) ss.
County of Maricopa)

KAREN L. SMITH, being first duly sworn, deposes and says:

1. I am the Director of the Water Quality Division of the State of Arizona Department of Environmental Quality ("ADEQ"), and have been duly authorized by the Director of ADEQ, Stephen A. Owens, to give this Affidavit on his behalf and on behalf of the Department. This affidavit is made upon my own personal knowledge and upon information and belief.

2. As Director of the Water Quality Division, I have worked on and supervised the effort by the State of Arizona to obtain delegation from the United States Environmental Protection Agency ("EPA") of the authority to conduct permitting of discharging facilities under the National Pollutant Discharge Elimination System ("NPDES") program under the federal Clean Water Act, Section 402(b), 33 U.S.C. § 1342(b).

3. Under my supervision, ADEQ has, since the year 2000, invested over One Million Dollars ($1,000,000) in resources and staff time in obtaining delegation of the NPDES program for Arizona, and in creating the replacement ADEQ program, known as Arizona Pollutant Discharge Elimination System or "AZPDES." This staff time and money has, since 2000, gone into developing new State of Arizona regulatory and statutory authorities, submission of the Arizona program to EPA for approval, the negotiation and drafting of memoranda of agreement with EPA to implement the program, and the drafting of program guidance materials for the regulated community.

4. ADEQ has also hired 9 new full-time employees to staff AZPDES, and has provided training to these new employees in permit writing, standards, inspections, compliance and enforcement, and computer applications.

5. While Arizona has been investing resources in its AZPDES program, the EPA has been reallocating resources from its former NPDES program in this state.

6. If EPA's delegation of NPDES authority to Arizona is voided, ADEQ will likely lose the resources currently dedicated to the AZPDES program because the Arizona State Legislature will then reallocate them. Given the current condition of the State budget, these resources likely will not be returned. Moreover, this being the middle of EPA's fiscal year, that agency would be highly constrained in its ability to redirect resources and personnel back to implementation of the NPDES program in Arizona.

7. If the delegation of authority for Arizona's AZPDES program is voided, confusion will reign among those members of the state business community with Clean Water Act NPDES/AZPDES permits. Arizona completed public notice in December, 2002 advising the public that all communications regarding NPDES program issues, and applications for permits under that program, must come to ADEQ, and further notified every holder of a NPDES permit in Arizona that they must henceforth report only to ADEQ. There will be a significant regulatory gap if the Arizona program's authority is suspended, because such facilities will not know where to send information regarding their permits, how to send it, or what government official to contact regarding permit issues.

8. More than 58 individual permit applications are being processed at the present time under the AZPDES program. If this program is suspended for any reason, action on these permit applications would also have to be suspended pending a determination as to what agency would take over their processing.

9. In addition, there are a number of general permits in development under the AZPDES program. ADEQ has just completed promulgation of the AZPDES Construction General Permit, which was issued on February 25, 2003. The federal NPDES national construction general permit (CGP) is currently no longer in existence, having expired on February 17, 2003. Because of the expiration of the federal CGP, if Arizona's Construction General Permit is suspended, there are an uncounted number of new discharging facilities which would otherwise be covered by the Arizona permit, that could no longer legally discharge under any authority.

10. Suspension of the AZPDES program would negatively affect Arizona's environment and water quality. ADEQ has, under my supervision, implemented education and outreach efforts currently under way, to ensure that the regulated community understands its responsibilities under the Clean Water Act and Arizona law. Inspections of discharging facilities have increased, and other site visits to such facilities are more frequent now, under the AZPDES program, than they were when EPA was managing the NPDES program it has just delegated to this state. These benefits, and this increased regulatory oversight,

will cease if the AZPDES program's authority is suspended.

/s/ Karen L. Smith
Karen L. Smith

SUBSCRIBED AND SWORN to before me this 30 day of April, 2003.

/s/ Annette Tripke
Notary Public

My Commission Expires:

6/14/06

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEFENDERS OF WILDLIFE, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, NATIONAL ASSOCIATION OF HOME BUILDERS; et al., Intervenors	No. 03-71439 EPA No. 67-Reg. 79629 District of Arizona, Phoenix ORDER (Filed Jun. 16, 2006)
DEFENDERS OF WILDLIFE; CENTER FOR BIOLOGICAL DIVERSITY; CRAIG MILLER, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ROBERT B. FLOWERS, Respondents.	No. 03-72894 EPA No. CV-02-00195-CKJ

Before: BERZON, Circuit Judge.

Intervenors' joint motion to stay the mandate is GRANTED. The mandate is hereby stayed for ninety days pending the filing of a petition for writ of certiorari in the

Supreme Court. FED. R. APP. P. 41(d). If such a petition is filed, and if the writ of certiorari is granted by the Supreme Court, the stay shall continue until final disposition by the Supreme Court.